

AK ABD RAHMAN BIN PG HJ
MOHIDDIN

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, BRUNEI
KUTLU FUAD P, SIR ALAN HUGGINS C,
SIR DEREK CONS C
[CRIMINAL APPEAL NO. 1 OF 1993]
25 MAY 1993

CRIMINAL LAW & PROCEDURE: Charge of voluntarily causing grievous hurt - Section 326 Penal Code - Trial Court convicting defendant - Appeal against conviction - Whether trial Judge's conclusion of the defendant's guilt was in anyway unsafe or unsatisfactory.

The defendant was convicted of an offence of voluntarily causing grievous hurt by means of an instrument which, used as an weapon of offence, was likely to cause death, an offence punishable under s. 326 of the Penal Code. In the light of the evidence adduced the trial Judge convicted the defendant and sentenced him to two years imprisonment with one stroke of the rotan.

The defendant appealed and raised *inter alia* the following grounds of appeal namely that;

- (1) The evidence tended to suggest that the defendant was in two places at once and complained that the learned Judge had failed to consider this fact as he had failed to mention it in his reserved judgment;
- (2) Insofar as the identification was concerned, although the learned Judge carefully directed himself, he failed to adhere to the *Turnbull* guidelines when he came actually to assess the reliability of the witnesses' evidence;
- (3) The trial Judge erred in law in invoking the provisions of s. 155 of the Evidence Act against the witness for the defence when the discrepancies in the witnesses evidence were not material; and
- (4) The learned Judge erred in law in finding a witness as unreliable when the witness was never challenged by the prosecution nor given the opportunity to rebut the allegation.

Held:

[1] Questions of timing or the exact order in which particular acts occur are typical of the

a kind in which inconsistencies, discrepancies or contradictions are likely to occur when witnesses are asked to recall, many months later, details of a dramatic incident which from its very nature is likely to be chaotic and confused.

b [2] There was no evidence to show that the learned Judge had failed to consider the arguments in support of ground 1. The Judge was not obliged to recite every detail of evidence or argument of Counsel in his judgment and the factual conclusion to which this argument would lead seemed so unlikely that it was not surprising that the learned Judge did not mention it.

c [3] The Judge was entitled to come to the conclusion that the quality of the identification evidence was good. Although on three occasions he mentioned the truth or honesty of witnesses, he did not fall into the trap of believing these to be the true criteria of reliable identification.

d [4] Bearing in mind that it is the credit of a witness that is in issue in the invocation of s. 155 of the Evidence Act, and taking into account the inconsistencies of the witness's evidence, the Judge below was clearly correct in his decision to allow the section to be invoked.

e [5] There was no rule or principle of law which obliged a Judge so presiding to accept a particular allegation as undeniable fact merely because the other side did not challenge it. The Judge did not err in law in finding the witnesses, Sahrin and Jolani, to be unreliable witnesses.

f [6] The weight of the matters in the other grounds of appeal either individually or cumulatively were not such that they must necessarily have raised a reasonable doubt in the mind of whatever tribunal.

g [7] The defendant admitted waving about a weapon that was capable of causing the injuries in question, three men gave evidence that they saw him actually do so and the weapon was found not long afterwards in the defendants possession with human blood stains upon its blade. There was no indication that the Judge's conclusion on the defendant's guilt was in anyway unsafe or unsatisfactory.

[Appeal against conviction dismissed].

i **Cases referred to:**

R v. Turnbull [1976] 3 All ER 549 (refd)
Muthusamy v. PP [1984] 14 MLJ p. 57 (refd)

Legislation referred to:

Evidence Act Cap. 108, ss. 154 & 155
Penal Code, s. 326

For the appellant - Yusof Halim; M/s. Sarjeet & Co.

For the public prosecutor - Ak Kashmirkhan

JUDGMENT**Sir Derek Cons C:**

The genesis of this appeal is a wedding that took place in Kg Sg Pandan, which is in the water village, on 24 February, last year. Part of the celebration was a karaoke competition held on a raised platform being the verandah of a house which fronted onto one of the major walkways. One of the contestants was Majid Bin Hj Momin. It would seem that he had pre-recorded a cassette to use in the competition but which he had entrusted to Ak Abd Rahman Bin Pg Hj Mohiddin, the defendant in the Court below and the appellant in these proceedings, to hand to the D.J. at the competition. However, the defendant had not arrived at the competition by the time that Majid's turn to sing came and Majid was forced, much to his annoyance, to sing something else. After the song was over, by which time the defendant had arrived, one of Majid's friends, Shahrum bin Hj Durahim remonstrated with the defendant for not bringing Majid's tape in time, scolded him and repeatedly jabbed his finger at him. Eventually the defendant, who was at one time a national boxing champion, lost his patience and punched Shahrum, who only saved himself from being knocked into the water by catching hold of a post nearby. It would seem that a general free for all then broke out, in the course of which the defendant took hold of a kerambit, which he said he luckily found on the floor, and then in his own words to the Judge below, "swung (it) to the left and right to scare them off". He denied actually hitting anyone with it, but there was evidence from 3 witnesses that having chased people off the platform, he pursued them onto the major walkway and then onto a minor walkway where he twice slashed Hadanan Bin Hj Salleh, a man who sadly had been having nothing to do with the karaoke competition. The wounds thus inflicted were a 4 1/2 ins. long cut to the cheek and nose and a 7 1/2 ins. cut to the chest, reaching right down into the thoracic cavity. Furthermore when the kerambit was recovered later that evening

a from the defendant's possession, there were human blood stains found upon it.

In the light of that evidence, the Judge below convicted the defendant of the charge which had been laid against him, namely, that he voluntarily caused grievous hurt to Hadanan by means of an instrument which, used as a weapon of offence, is likely to cause death, an offence punishable under s. 326 of the Penal Code. The defendant was sentenced to imprisonment for 2 years with 1 stroke. With the help of Mr. Yusof Halim, he now appeals against that conviction.

c Ground 1 of the appeal, which to a certain extent overlaps Ground 2, seeks to undermine the reliability of the 3 witnesses who implicated the defendant. The arguments in support were made fully to the Judge below in a written submission of no case to answer and were drawn to his attention again in the closing submission of defence Counsel. They included the argument which is at the heart of Ground 1, namely, that the evidence tended to suggest that the defendant was in two places at once, that is he punched Shahrum on the platform and struck Hadanan on the minor walkway. As it was common ground that the general melee was triggered off by the defendant punching Shahrum on the platform, it inevitably follows, so the argument runs, that it must have been someone else who at that moment was attacking Hadanan on the minor walkway. It is complained that the Judge did not consider or did not adequately consider this possibility, because he failed to mention it in his reserved judgment.

e We are not persuaded that he did so fail. As we have just observed, the point was made more than once to him and he is not obliged to recite every detail of evidence or argument of Counsel in his judgment. Indeed, the factual conclusion to which this argument in particular would lead seems to us so unlikely in the circumstances as we perceive them, that it is not surprising that the Judge did not mention it. Questions of timing or the exact order in which particular acts occur are typical of the kind in which inconsistencies, discrepancies or contradictions are likely to occur when witnesses are asked to recall many months later - details of a dramatic incident which from its very nature is likely to be chaotic and confused.

g

h

i

The second ground of the appeal turns principally on the *Turnbull* guidelines: *R v. Turnbull* [1976] 3 All ER 549. It is suggested that although the Judge carefully directed himself in this respect, he failed to adhere to the guidelines when he came actually to assess the reliability of the witnesses' evidence. We are unable to agree. Although it is true that on three occasions he mentioned the truth or honesty of witnesses, we are not persuaded that he fell into the trap of believing these to be the true criteria of reliable identification.

Taken in its context the first occasion on which the Judge so refers would seem to be an acceptance of the honesty of Azlin Bin Osman, not with regard to the identification as such, but to the failure of Azlin to embroider, as well he might have done, the opportunity that he had for observation of the defendant. The second occasion, this time in regard to Jufri bin Damit, concerned again not the actual identification of the defendant, but was instead a comparison of Jufri's evidence with that of other witnesses. The third occasion, which referred to the 3 witnesses generally, is immediately followed by a passage dealing expressly with the factors mentioned in *Turnbull* and indicates, as does the entirety of the judgment when read as a whole, that it was upon these factors that the learned Judge made his assessment.

In the course of his argument, Mr. Halim has taken us carefully and in detail through the relevant evidence with the object of showing that even so the opportunities for reliable identification were not present or that the inconsistencies, discrepancies and contradictions within or between the various testimonies were such that the identification should have been discounted. We do not propose to rehearse again the passages to which Mr. Halim has drawn our attention. It is sufficient to say that they are all of the kind that we are not surprised to find bearing in mind the circumstances of that night and the lapse of time before the Court hearing. Rather we would be surprised if we did not find them. In our view, the evidence was such that the Judge was entitled to come to the conclusion, as he did, that the quality of the identification evidence was good.

The third ground of the appeal relates to the evidence of Hadanan that, upon his release

a from hospital, he identified the defendant from one of many photographs he saw on the wall of the police station, evidence which the Judge took into account in concluding that the defendant had been correctly identified as the assailant. Hadanan described these photos as "wanted criminal photographs". He was apparently taken to mean the kind of poster that the police put up from time to time to advertise their desire to interview a person who is described thereon and usually contains a large photograph in the centre. It is clear from the police evidence that the defendant never figured in a poster of that kind. Indeed, by the end of his evidence, the sergeant who was responsible for taking the photographs of the defendant upon his arrest seems somewhat uncertain as to whether any photograph had in fact been put on the wall at all. Relying on that evidence, together with the fact that no photograph was produced in Court, and that no police witness actually confirmed that Hadanan had made such an identification, it is suggested that the Judge should have given no consideration to Hadanan's evidence.

e Again we are unable to agree. It was at no time suggested to Hadanan that his evidence in this respect was not to be believed, so it is not surprising that the prosecution took no step to adduce further police evidence in support. The argument turns largely upon the assumption we have just mentioned, that when he spoke of "wanted criminal photographs", Hadanan was in fact referring to posters of the kind we have also just mentioned, an assumption that, perhaps due to misunderstanding at the time, was never established by evidence.

g We may add at this point that no suggestion was made below or in this Court that the value of the subsequent identification at the trial by Hadanan was lessened by the fact that he had many months earlier been shown the defendant's photograph.

h Ground 4 has been withdrawn, but before proceeding further, it is necessary to continue with the narrative of events. According to the defendant, after the fight was over, and finding that those in charge were not willing to continue the karaoke competition, he looked for his relative, Mohd Sahrin bin Hj Abd Rahman and then went with Sahrin and Sahrin's wife to Sahrin's house, which we

understand was some 5 minutes walk away. Then, a further 15 to 20 minutes later, he went on to the house next door, which belonged to Jolani Bin Hj Alim, the brother of his girlfriend. There, some two hours later, the defendant was arrested, the kerambit being found in the same room.

When the defendant was arrested, he was wearing a white shirt. The evidence of Sahrnun and Jolani was that the defendant was wearing the same white shirt when he had arrived at their respective houses earlier. The evidence of other witnesses was that the defendant had been wearing a red shirt during the Karaoke competition and the fight.

We now turn to ground 5 which depends upon s. 154 and 155 of Evidence Act Cap. 108. These sections provide -

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

155. The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him -

.....

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

In the course of the evidence given by Sahrnun, the learned Judge at the request of the prosecution, allowed Sahrnun to be examined on the statement he had given to the police shortly after the incident when he also had been arrested, although he was subsequently released.

The Judge based his decision on two inconsistencies. The first was that in his statement Sahrnun had said:

When I sat down I saw that many people were surrounding (the defendant) and I saw one knife fell down at that place, on the dais. Then the knife was taken by (the defendant).

But in his evidence we find this exchange.

- Q. Did you see (the defendant) holding any object?
A. He did not hold anything.

- a Q. Did he pick up anything during the fight?
A. During the fight I saw a knife. I saw the said knife placed on the floor and someone's hand picked the knife.

- Q. You know whose hand?
A. I'm not sure whose hand because at that time there were a lot of people.

- b The second inconsistency was that in his evidence Sahrnun said that of those who attacked the defendant after he punched Shahrum, "some holding wooden sticks 2 by 3, some holding iron rod". These implements were not mentioned in his statement to the police.

- c It is suggested by the fifth ground that the Judge erred in law to give his consent in this way because the first discrepancy was not material, in that the defendant did not at any time dispute that he was holding the knife in question; and as to the second, relying on the words of Taylor J. in *Muthusamy v. PP* [1984] 14 MLJ p. 57 "a mere omission is hardly ever a discrepancy". To that, we would add the subsequent proviso of the Judge, unless "the difference is so material as probably to amount to a discrepancy affecting the credit of the witness."

- e It has to be remembered in this context that, as Taylor J. appreciated and as appears from the opening words of s. 155, it is the credit of the witness that is in issue not the offence itself. Bearing that in mind it seems to us that we need do no more than set out, as we have above, the two versions given by Sahrnun to indicate that the Judge below was clearly correct in his decision to allow the section to be invoked.

- f The submission of Counsel for the prosecution as regards the white shirt was made in his reply to the submission of no case to answer.

- g The prosecution is not disputing that when the defendant was arrested he was wearing a white shirt. Neither the prosecution dispute when the defendant went to Sahrnun's wife house and Hj Alim's house and these both occasions the prosecution is not disputing that he was wearing a white shirt. One gap before that the defendant went somewhere else, this is evidenced by ordinary statement by the defendant on 26 February, of p. 3: After that Sahrnun, his wife and I went back together. Sahrnun and his wife went back to the house of Sahrnun's

i

wife and I went back to my girlfriend's house in Kg Sg Pandan too.

The Judge did not so restrict himself. He said:

I can only infer that if the defendant was wearing a red long sleeve shirt and blue jeans during the fight and later he was wearing a white shirt and black jeans when he was arrested, he must have changed clothes during the two hours period between the fight and the time he was arrested.

By ground 7 of the appeal, it is complained that the Judge erred in law in going beyond the implied concession of the prosecution. We are unable to see why that should be so. We understand that there is provision by which facts can be agreed between parties to criminal litigation, which facts would then become binding upon the presiding Judge. That course however was not adopted in the present instance and we are not aware of any rule or principle of law which obliges a Judge so presiding to accept a particular allegation as undeniable fact merely because the other side does not challenge it. The Judge found Sahrun and Jolani to be unreliable witnesses. He was satisfied by evidence of other witnesses that the defendant was wearing a red shirt at the time of the competition and when Hadanan was slashed. He was satisfied that when arrested two hours later the defendant was wearing white. It is inevitable that the Judge should conclude that at some stage in between the defendant had changed his clothing.

Of Jolani in particular the Judge said:

I do not believe him. I found him to be an unreliable witness. He is not only related to the defendant but also to the brother of the defendant's girlfriend at that time.

By ground 6 of the appeal, it is suggested that this passage likewise indicates an error of law, in that Jolani was never challenged by the prosecution nor given the opportunity to rebut the allegation. It is difficult, if not impossible, to see how the prosecution could have challenged Jolani, when it was the prosecution who called him as a witness, not for their own benefit, but for that of the defence by merely tendering him for cross examination. We do not think this point assists the defendant in any way.

a Grounds 8 and 9 are as follows -

8. The learned trial Judge failed to consider or to adequately consider the unlikelihood of the appellant who was alleged to have the foresight to dispose of his shirt and pants in order to avoid detection, but who at the end of the fight -

b

- a. Requested for the contest to be continued;
- b. Made no attempt to leave the vicinity of the scene for his home and;
- c. Made no attempt to dispose of the alleged weapon.

c

9. The learned trial Judge had failed to consider or to adequately consider that if the appellant, who is a highly trained boxer, had intended to use the alleged weapon offence, then it would be the people around the appellant during the fight or those whom the appellant chased who would have suffered injuries and not the complainant who was not involved in the fight and for whom the appellant had no reasons to injure.

d

Undoubtedly these grounds contain matters which could have been, and in fact in substance were, put before the Judge below for his consideration. Mr. Halim very frankly concedes that he cannot suggest that their weight either individually or cumulatively is such that they must necessarily have raised a reasonable doubt in the mind of whatever tribunal. His complaint really seems to be that the Judge made no mention of them when giving reasons for his verdict.

e

f

As to that we have already observed that a Judge is not required to comment upon every single matter put before him for his consideration. Of those which he rejects he will usually only mention any that have given him appreciable pause for thought, and possibly these particular considerations did not seem to the Judge below to fall within that category. Put simply this was a case where the defendant admitted waving about a weapon that was capable of causing the injuries in question; three men gave evidence that they saw him actually do so; the weapon was found not long afterwards to have human blood stains upon its blade. We have to say that despite the conscientious and able argument of Mr. Halim, we do not for one moment have any anxiety that the Judge's conclusion of the

g

h

i

defendant's guilt was in anyway unsafe or
unsatisfactory.

And for these reasons, the appeal is
dismissed.

ROMZI BIN ABDULLAH

v.

SALWAH BINTE HAJI SAIM

COURT OF APPEAL, BRUNEI

KUTLU FUAD P, SIR ALAN HUGGINS C,
SIR DEREK CONS C

[CIVIL APPEAL NO. 1 OF 1992]

27 MAY 1993

b

c

***CONTRACT: Breach - Whether breach proven -
Whether contract conditional - Claim for dam-
ages - Mitigation - Whether there was a duty to
mitigate - Whether reasonable steps taken to
mitigate loss.***

d

e

The defendant, the boyfriend of the plaintiff,
wished to buy a car. As he did not possess a
driving licence, the agreement to purchase was
executed in the name of the plaintiff and the
car was to be registered in her name until he
obtained a licence and thereafter his name was
to be substituted as that of the registered
owner. The deposit for the purchase was not
paid and the vendor obtained judgment against
the plaintiff. The plaintiff continued paying
the instalments on the hire purchase agree-
ment until June 1991 when the finance com-
pany repossessed the car.

f

The plaintiff sued the defendant for breach of
contract and was awarded BD 31,440 with
interest. The defendant's counterclaim for re-
payment of money paid and for sums allegedly
due under another contract was dismissed.
The defendant appealed against the judgment
on both the claim and the counterclaim.

Held:

g

[1] There was ample evidence upon which the
Judge could properly find for the respondent
upon the issue of liability and there was no
ground upon which it could be said that he
came to a wrong conclusion upon that issue.

h

[2] The respondent was not shown to have
failed to take any reasonable steps to mitigate
her loss.

i

[3] The learned Judge was not wrong in award-
ing as damages the amount paid by the respon-
dent under the judgment against her in favour
of the vendor of the car even though the respon-
dent had already obtained default judgment
against two other defendants as there was no
evidence to suggest that those default
judgments had been satisfied.

[Appeal on the claim and counterclaim dismissed].